Supreme Court, U.S.
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No. 90-1724

In The

Supreme Court of the United States

October Term, 1991

CLYDE L. WEILER,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Western District

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

James R. Wyrsch
(Counsel of Record)
Ronald D. Lee
Madonna L. Reeves
Jacqueline A. Cook
1006 Grand Avenue, 10th Floor
Kansas City, Missouri 64106
Tel: (816) 221-0080
Fax: (816) 221-3280
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

Respondent argues that *State v. Jones*, 716 S.W.2d 799 (Mo. 1986) (en banc), does not rigidly rule out evidence of a victim's prior sexual history *even though it* does not fit into one of the categories expressly permitted by the rape shield statute if the exclusion of such evidence would deprive a defendant of a constitutional right to a fair trial, citing *State v. Foulk*, 725 S.W.2d 56 (Mo. Ct. App. 1987) for support. (Respondent's Brief at p. 4). However, this is in direct contradiction to both the applicable case law and to the Respondent's position in the Courts below. In *State v. Foulk*, 725 S.W.2d at 61, the Missouri Court of Appeals, Eastern District held that even if evidence of prior sexual conduct is relevant to a material fact or issue raised by the defense, it is still *not* admissible under the rape shield law unless it falls within an exception contained in the rape shield statute. Moreover, on direct appeal of this case, the Respondent argued that *State v. Jones*, 716 S.W.2d 799 (Mo. 1986) (en banc) held that relevant evidence or prior sexual conduct is not admissible unless it falls squarely within one of the four enumerated exceptions under the rape shield statute. (Appendix p. 6a). Petitioner finds it interesting that Respondent now argues there is no split in the Missouri lower courts over the interpretation of *Jones* and the application of the rape shield statute.

Respondent next argues that the strict application of the rape shield statute required by *Jones* has no bearing on the instant case because Petitioner was not subjected to strict application. (Respondent's Brief at p. 9). This simply is not the case. Petitioner has always maintained that the systematic exclusion of evidence of E.B.'s (the "Complainant's") prior sexual proclivity because it did

not fit squarely within one of the enumerated exceptions to the rape shield statute deprived Petitioner of his right to a fair trial. The Respondent attempts to divert the Court's attention from the real issue by suggesting that the issue is whether E.B. consented and arguing that E.B.'s consent is not a defense. Consent is not the issue in this case. (Respondent's Brief at p. 10).

Petitioner has always maintained his innocence and has always relied on the defense that E.B. had sufficient sexual experience to be capable of fabricating her testimony; that in fact, she did fabricate her testimony implicating Petitioner. Petitioner was foreclosed from presenting this critical defense to the jury. At the same time the Respondent knew that the rape shield statute would effectively muzzle the witness and prevent Petitioner from establishing the truth of his defense. Thus, the Respondent set out on a deliberate tactic to undermine Petitioner's defense by repeatedly suggesting that E.B. was of such tender years and limited experience that it would have been impossible for her to fabricate her testimony with its explicit sexual details. Petitioner made an offer of proof that E.B. had stated that being around boys made her horny, that E.B. masturbated frequently, sometimes in front of other people, that E.B. had been seen acting out sexually with her brother, and that E.B. had been seen attempting oral sex on a five-year-old neighbor child. Because this evidence was excluded, the jury was left with the impression that E.B. was an innocent and that her testimony against Petitioner, which was filled with sexual depictions, must be true because she did not have outside experiences that would have

provided her the knowledge needed to fabricate or fantasize such stories. If this evidence had not been excluded, the jury would have known that E.B. was a virtual encyclopedia of sexual knowledge and quite capable of constructing and fabricating her accusations against Petitioner.

Finally, the Respondent cites a portion of the Missouri Court of Appeals, Western District opinion which states:

> In the case before us, however, we believe the exclusion of the evidence of E.B.'s sexual practices was not prejudicial to the Defendant and did not deprive him of a fair trial. From the State's own evidence the jury could infer that E.B. was sexually aware, and the evidence defendant was not permitted to introduce would have added very little. Notice the following evidence which was before the jury without objection from the State's own witnesses: E.B. testified that she, in return for candy, money and toys, had been touching defendant's sexual organ (including fellatio) at his instigation since she was seven. E.B. had been the victim of "bad touching" by her father when she was "two or three" and was attending sessions at Metropolitan Organization to Counter Sexual Assault ("MOCSA"). Defendant transported her to and from the MOCSA meetings. Furthermore, E.B.'s familiarity with the male anatomy and the technique is clear from Tina's description of the act.
>
> The evidence which was excluded would have no tendency to impeach E.B.'s credibility. E.B.'s consent to the acts with which Defendant was charged was no defense and her consent was not at issue in the case. We have concluded that the exclusion of the rape shield statute of the evidence of E.B.'s sexual practices and proclivities was entirely correct.

State v. Weiler (Appendix at p. 6a).

The Respondent argues and the Appellate Court hypothesizes that the admission of the excluded testimony would have "added very little" because the Respondent had introduced testimony that E.B. had been sexually abused by her father. However, at trial E.B. testified that the sexual abuse by her father was different from the sexual experience she had with the Petitioner. Thus, the jury could easily have concluded that her experience with her father would not have provided her adequate knowledge to construct and fabricate her accusations against Petitioner. Petitioner should have been permitted to present this critical evidence of the full extent of E.B.'s experiences to the jury in order to vigorously support his defense. Anything less denies him his fundamental rights under the fifth and sixth Amendments to the United States Constitution.

Petitioner asserts that the Missouri Court of Appeals, Western District, acted erroneously when it allowed the Respondent not only to use the Missouri rape shield law to protect the Complainant, but also to use it as a weapon in cross-examination and as a device to shield the truth from the jury. The exclusion of evidence of the Complainant's sexual experiences prevented Petitioner from exposing E.B.'s ability to fabricate testimony and denied Petitioner his fundamental rights under the fifth and sixth Amendments to the United States Constitution.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

JAMES R. WYRSCH (#20730)
(Counsel of Record)
RONALD D. LEE (#33870)
MADONNA L. REEVES (#38295)
JACQUELINE A. COOK (#36389)
1006 Grand Avenue, 10th Floor
Kansas City, Missouri 64106
Tel: (816) 221-0080
Fax: (816) 221-3280

Attorneys for Petitioner